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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. [redacted] 29

CARL A. HANSBERRY, NANNIE L. HANSBERRY, SUPREME LIBERTY LIFE INSURANCE COMPANY, a corporation, HARRY H. PACE, JAMES JOSEPH BURKE and ISRAEL KATZ,

Petitioners,

vs.

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, LOUISE G. ANDERSON, LYMAN M. ANDERSON and KATHRYN LUTTRELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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No. _____

CARL A. HANSBERRY, NANNIE L. HANSBERRY, SUPREME LIBERTY LIFE INSURANCE COMPANY, a corporation, HARRY H. PACE, JAMES JOSEPH BURKE and ISRAEL KATZ,

Petitioners,

vs.

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, LOUISE G. ANDERSON, LYMAN M. ANDERSON and KATHRYN LUTTRELL,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, CARL A. HANSBERRY, NANNIE L. HANSBERRY, SUPREME LIBERTY LIFE INSURANCE COMPANY, HARRY H. PACE, JAMES JOSEPH BURKE and ISRAEL KATZ, respectfully pray for a writ of certiorari herein, to review a certain final decision of the Supreme Court of the State of Illinois, being the highest court of said State, in the above

entitled action, the opinion and decision of said court having been rendered and filed on October 10, 1939, and a petition for a re-hearing, also filed on the 4th day of November, A. D. 1939, being within the time allowed by the rules of the Supreme Court of Illinois, which said petition for re-hearing was, after being entertained and considered by the said Supreme Court of Illinois, denied on the 13th day of December, A. D. 1939, and this petition for certiorari, together with the certified transcript of record are herewith filed in this court, being within three months after denial of the petition for re-hearing by the Supreme Court of Illinois.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.

The respondents, Anna M. Lee, Edward L. Govanus, Esther Govanus, Louise G. Anderson, Lyman M. Anderson and Kathryn Luttrell (Plaintiffs below), brought an action in the Circuit Court of Cook County, for the purpose of enforcing a certain "restrictive agreement" purporting to involve 500 or more separate parcels of real estate owned by 500 or more owners in a certain section on the South Side of the City of Chicago. The area covered by the "restrictive agreement" consists of approximately 27 blocks and parts of blocks between 60th and 63rd Streets and between Cottage Grove and South Park Avenues in the City of Chicago, which said area is surrounded on the South by approximately 12,000 colored people (Rec. 251-252), on the North and West by approximately 50,000 colored people (Rec. 244, 252-253), on the North by Washington Park, used predominantly by colored people (Rec. 253), *and 125 colored families have lived within the area for periods of time ranging from*

hree to five years prior to the commencement of this action. (Rec. 82.) The area includes South Park Avenue, which runs through and adjacent to the heart of a South Side district in Chicago occupied by at least 150,000 colored people.

The substance of this agreement was that no part of the property purported to be restricted should be sold, leased to, or permitted to be occupied by any person of the colored race prior to January 1, 1948, or thereafter, unless said restrictive agreement should be abrogated by the owners of 75% of the frontage. The agreement contained the following provision:

> *"This agreement and the restrictions herein contained, shall be of no force or effect unless this agreement or a substantially similar agreement shall be signed by the owners above enumerated of 95% percentum of the frontage above described* or their heirs and assigns, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31, 1928."

The complaint as amended, alleged that the owners of 95% of the frontage signed the restrictive agreement, and that it was recorded February 1, 1928. It further alleged a conspiracy on the part of the defendants to destroy the agreement by selling or leasing property in the restricted area to Negroes. It charged particularly that there had been a conspiracy between the defendants, James J. Burke, Jay B. Crook, Harry H. Pace, The Supreme Liberty Life Insurance Company, a corporation, and the Hansberrys, to violate said restrictive agreement by the acquisition and purchase of the premises at 6140 Rhodes Avenue (Rec. 10-13), by the said Hansberry through the means of Jay B. Crook. The plaintiffs charged that the defendant, Israel Katz, had listed for sale his property at

6018 Vernon Avenue, with James J. Burke, a white real estate broker, and had made threats to sell his property to Negroes. (Rec. 17-18.)

The complaint further alleged that the several plaintiffs (respondents herein) were parties to and signers of the alleged restrictive agreement; that they were the several owners of certain properties in said area and further, that their real estate would be irreparably damaged by reason of the violation of the agreement.

The plaintiffs sought a temporary injunction which petitioners resisted by motions to strike the complaint and dismiss the suit (Rec. 22-28) and by oral argument in support thereof.

On July 8, 1937, Judge Michael Feinberg, to whom the cause was then referred, entered a temporary mandatory injunction over objections of petitioners, requiring the Hansberrys to move from the premises at 6140 Rhodes Avenue, and ordering also a writ of assistance to issue upon failure of said Hansberrys to move from said premises. (Rec. 28-32.) Said order of injunction likewise found that the Hansberrys were unlawfully in title to the aforesaid premises at 6140 Rhodes Avenue (Rec. 31), although said cause had not been heard upon the merits, and although said case was not at issue on the pleadings. The defendant Katz was likewise enjoined from selling or leasing his property to colored people. (Rec. 30.)

The defendants filed their several and respective sworn and verified answers (Rec. 32-48, 56-58, 78-91) categorically and specifically denying the allegations of the complaint as to the charges of conspiracy, and denied that the owners of 95% of the frontage described in the restrictive agreement had signed the agreement and asserted that the agreement never went into force or effect. The defend-

ants in their answers (Rec. 32-48, 56-58, 78-91) likewise set up several affirmative defenses contending that the alleged restrictive agreement was invalid and void, was an unlawful restraint on alienation, was also against the public policy of the State of Illinois and the United States of America, and that the enforcement of the restrictive agreement by the courts of the State of Illinois, would deprive the defendants of their liberty, their freedom of contract, their rights and their property without due process of law, and would likewise deprive the defendants of the equal protection of the law, and would abridge the privileges and immunities of the defendants as citizens of the United States of America, in violation of the 14th Amendment to the United States Constitution. (Rec. 32, 40-42, 47, 56, 86-88.)

The defendants in their several and respective answers (Rec. ..), likewise denied that the alleged restrictive agreement was a covenant running with the land, but asserted was a covenant against persons merely on account of their race and color. Defendants further denied that plaintiffs were bringing a representative suit, and stated that there had been such a change in the character of the neighborhood that it would be inequitable to enforce any such alleged agreement. The defendant, Katz, denied the execution and acknowledgment of the agreement and stated under oath that his signature to said alleged agreement had been obtained by fraud and trickery. (Rec. ...)

After the filing by the defendants of their several answers, motions to dissolve (Rec. 48-50, 58) were filed by them, together with affidavits (Rec. 50, 58) supporting denial of the execution of the agreement and compliance with conditions precedent contained in said agreement. To the defense that the agreement was never executed, plaintiffs replied that that question was *res judicata* (Rec.

60-61) having been determined in the case of *Burke* v. *Kleiman,* No. 567687, in the Superior Court of Cook County, Illinois. The chancellor, Judge George Bristow, reserved rulings on the motion to dissolve of the defendants and the plea of *res judicata* until a hearing on the merits. (Rec. 75-76.) The defendants filed additional pleadings called rejoinders (Rec. 72-75, 91-101), denying the rights of the plaintiffs to plead estoppel by verdict, or *res judicata* and denying that the case or decree of *Burke* v. *Kleiman* could be lawfully raised as estoppel by judgment or as *res judicata* and stating that the application of *res judicata* would deprive them of their rights and property without due process of law, in violation of the 14th Amendment to the Federal Constitution. *At the close of the evidence, the chancellor found that the owners of only about 54% of the frontage had signed the agreement, which agreement itself contained the condition precedent that it should be of no force or effect unless signed by the owners of 95% of the frontage,* but the chancellor in spite of his finding that the agreement was invalid by its own terms, and had never come into effect, nevertheless, "reluctantly" held the question of the execution and validity of the agreement was *res judicata* by virtue of the decree in *Burke* v. *Kleiman,* and further held *Burke* v. *Kleiman* to be a representative suit binding upon the petitioners in the instant case. (This case of *Burke* v. *Kleiman* was affirmed in 1934 by the Appellate Court of Illinois and reported in Vol. 277 at page 519, 189 N. E. 372.)

Notwithstanding the decree, the trial chancellor in his formal opinion (Rec. 266-269) rendered at the close of the case, used the following language: "In other words, there is an invalid agreement which is now sought to be enforced. And the answer that the plaintiffs make to that

contention is not to try to show that it was properly signed by the requisite number of property owners, but that its validity has already been sustained by several courts. * * * We have a man named Burke, whose personality and activity enter into the picture. It is urged, and I think with a good deal of merit, that the lawsuit (*Burke* v. *Kleiman*) which he brought to test out the validity of the agreement was more or less a dummy proceeding, of which can be easily seen that although it appears on the face of which to be representative and class in its character, still it (*Burke* v. *Kleiman*) was conceived by him and prosecuted by him for the sole purpose of establishing the integrity and invulnerability of the district that is under the covenant; in other words, to make it unassailable. * * * And he in effect, says through himself and through those he was working with to bring about the destruction of this agreement, he says in effect that, lawsuit (*Burke* v. *Kleiman*) that I brought was a fraud, and I had no authority to represent the class, and I was not representing the class. It was my own personal lawsuit. I obtained the stipulation of the facts that the agreement contained the signatures of more than 95% of the frontage, and that was all a fraud; *and we know it was a fraud because the proof now shows that there wasn't 95%. * * * He committed a fraud when he brought this lawsuit.* (*Burke* v. *Kleiman.*)

The following are the material and pertinent facts in respect to the proceedings and the decree of *Burke* v. *Kleiman* (Rec. 312-354) pleaded by respondents as *res judicata:*

In October, 1932, Olive Ida Burke (wife of James J. Burke, one of the petitioners herein), owning a parcel of property at 6039 Vernon Avenue, Chicago, filed a suit in equity (Rec. 312), purportedly on her own behalf and

on behalf of all other property owners adversely affected by violation of the agreement thereinafter mentioned) against Isaac Kleiman, owner of the premises at 417 East 60th Street, Chicago, Illinois (not the property in the instant case), Samuel Kleiman, owner of a mortgage note on said premises, Charles Sopkins, Trustee for the benefit of the owner of the mortgage note, and James Lowell Hall, a Negro tenant in said building, to enforce specifically by injunction, the same agreement sought to be enforced in the instant case.

No testimony was taken or proof adduced showing that the required frontage consent of 95% had ever been obtained, but a stipulation was signed by the attorney for Olive Ida Burke and by Charles J. Sopkins, an attorney who purported to act for himself and the other defendants. (Rec. 65, 339-349.) *It was stipulated by the attorneys merely, that 95% of the owners of the property in said restricted area had signed, sealed and acknowledged said agreement* (not the owners of 95% of frontage as required on the agreement) and that it was in full force and effect. (Rec. 65, 339.) A decree was entered in October, 1933, declaring said restrictive agreement to be in full force and effect and that it was a covenant running with the land and binding upon the defendants in that suit (Rec. 338-353), *but the Court did not find that it was a representative suit.*

There were no other property owners or signers made parties defendant in the case of Burke v. *Kleiman.* The only property owners being Olive Ida Burke and Isaac Kleiman. *The only property involved was the property of Isaac Kleiman at 417 East 60th Street,* which was the only parcel over which the court had jurisdiction. Neither the petitioners nor any of their grantors were made parties to the proceeding of *Burke* v. *Kleiman.* There was

no notice by publication or otherwise given to any of the other 500 or more property owners or signatories to the said alleged restrictive agreement. The case was merely one where one property owner, not a signer of the restrictive agreement, was suing other property owner, not a signer of the agreement, to enforce the restrictive agreement.

Burke, former President of the Woodlawn Property Owners Association which filed the *Burke* v. *Kleiman* case charged in his answer (Rec. 44-46) that the invalidity of the agreement was known to the Association at the time the several suits were conducted by it to enforce the agreement, which allegations were never rebutted by the plaintiffs in the instant suit.

In the *Burke* v. *Kleiman* case, the execution and validity of the agreement were not put in issue by the answers (Rec. 330-337) of the several defendants therein but their answers were confined to the sole unsubstantial and frivolous defense that violations in respect to 3 or 4 parcels included in an agreement covering 500 or more parcels constituted a change in the character of the neighborhood so as to make it inequitable to enforce the covenant. (Rec. 330-337.)

In the instant case, Isaac Kleiman and James Lowell Hall, parties defendant in the case of *Burke* v. *Kleiman*, both appeared and testified that they had not employed or authorized any lawyer to represent them in the case of *Burke* v. *Kleiman*, nor did they have any knowledge of any stipulation of facts, nor had they authorized its signing. (Rec. 237-238.) The chancellor in the instant case, after competent proof, found that the stipulation was a false stipulation, and that the case and proceedings of *Burke* v. *Kleiman* were collusive and fraudulent, and

that the whole case was tainted with fraud. (Rec. 267-268.) The affidavit (Rec. 283-286) executed by Fred L. Helman, the individual who attempted to create the restrictive agreement, shows that as early as *February 1, 1929, which was three and a half years prior to the filing of the suit of Burke* v. *Kleiman, it was known by the Woodlawn Property Owners Association and its officials of which said Fred L. Helman was the Executive Secretary, that the alleged restrictive agreement was invalid according to its own terms, because the required frontage consent had not obtained.* (Rec. 284-286.) The record shows that the same Fred L. Helman, as Notary Public, took the acknowledgment of Olive Ida Burke to the complaint in the case of *Burke* v. *Kleiman.* (Rec. 329.) Helman's affidavit (Rec. 284-286) shows that it was known, at the time of the filing of said suit (October, 1932) by him and other officials of the Woodlawn Property Owners Association, that said restrictive agreement was invalid and had never come into force and effect according to its own terms, and that this knowledge was acquired three and a half years prior thereto.

Helman's affidavit (Rec. 286) likewise shows that he conferred with various officials of the Woodlawn Property Owners Association in regard to the filing of said case of *Burke* v. *Kleiman,* and that he directed or caused to be paid to the attorneys representing Olive Ida Burke, the court costs for the filing of said case, and that he generally supervised the prosecution of said case up to year 1933 when he severed his connection. (Rec. 286.)

The decree in *Burke* v. *Kleiman* makes no mention of any representative or class suit. (Rec. 338-353.) Nor does the Appellate Court on Appeal make any reference to its being a representative or class suit. (277 Ill. App. 519, 189 N. E. 372.)

In spite of the finding that the case and proceedings in *Burke* v. *Kleiman* were tainted with fraud and collusion, Chancellor Bristow, nevertheless reluctantly sustained the plaintiffs' plea of *res judicata* (Rec. 119) and thereupon in his decree (Rec. 102-125) sustained the objections of the plaintiffs to the defendants' answers (Rec. 122) and proceeded to declare the conveyance to the Hansberrys, void, and directed that upon the failure of the Hansberrys to convey their property to a white person, that a Master in Chancery of the court convey the same to Jay B. Crook, but *said decree* (Rec. 123) *in no manner whatsoever provided for compensation to the Hansberrys.* The chancellor enjoined Burke from selling or leasing any real estate within the alleged restrictive area to Negroes or to white persons for the purpose of selling or leasing to Negroes; enjoined Katz from selling or leasing his building at 6018 Vernon Avenue to Negroes; enjoined Pace and the Supreme Liberty Life Insurance Company from making any further loans on the real estate in the restricted area.

Inasmuch as a free hold was involved, the petitioners appealed directly to the Supreme Court of Illinois, being the highest court of the State.

II.

JURISDICTIONAL STATEMENT.

1. The jurisdiction of this court is based upon Section 237b of the Judicial Code as amended by the Act of January 13, 1925; Volume 8, Fed. Code Annotated (FCA), Title 28. Judicial Code, Section 344b.

The Supreme Court of Illinois, on October 10, 1939, by *a divided court,* affirmed the judgment or decree of

the Circuit Court of Cook County, Illinois, in favor of the respondents herein and against the petitioners. (Volume 372 Ill., page 369, 24 N. E. (2d) 37.) Petition for rehearing was later filed by petitioners within the time allowed by the rules of the Supreme Court of Illinois on the 4th day of November, 1939 (Rec. 475), and afterwards was denied on December 13, 1939, and this petition for certiorari is now filed within three months after the denial of the petition for rehearing in the Supreme Court of Illinois.

The affirmance of the decree of the trial court in its wrongful application of the doctrine of *res judicata* denied the petitioners notice and a real opportunity to appear, to be heard, and to defend, and violated the petitioners' rights to due process of law under the 14th Amendment to the Federal Constitution under which Amendment the petitioners specially set up and claimed certain rights, titles, privileges and immunities. See *Postal Cable Telegraph Co.* v. *Newport,* 247 U. S. 464 at 475; 38 S. Ct. 566, 62 L. Ed. 1215; *Wabash Railway Co.* v. *Adelbert College,* 208 U. S. 38 at 57-58 and 59, 28 S. Ct. 182, 52 L. Ed. 379; *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662 at 671; *Smith* v. *Swormstedt,* 16 Howard 288 at 303; *Hamer* v. *New York Railways Co.,* 244 U. S. 266 at 273; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 at 682; *Scott* v. *Donald,* 165 U. S. 107 at 115 to 117; *Pennoyer* v. *Neff,* 95 U. S. 714 at 733; *Scott* v. *McNeal,* 154 U. S. 34 at 45 and 46; *Williams* v. *Gibbes,* 17 Howard 239 at 254, 257; *Simon* v. *Craft,* 182 U. S. 437; *Ward* v. *Board of County Commissioners,* 253 U. S. 17 at 22; *Chase National Bank* v. *Norwalk,* 291, 431 at 438; *Windsor* v. *McVeigh,* 93 U. S. 274 at 277; *Earle* v. *McVeigh,* 91 U. S. 503.

The affirmance of the decree of the trial court necessarily deprived the Hansberrys of their rights and property without due process of law in violation of the 14th Amendment to the Federal Constitution because no compensation was provided for them in or by said decree thereby amounting to a spoliation and said Hansberrys specially set up and claimed rights, privileges, titles and immunities as citizens of the United States of America under Section One of the 14th Amendment to the Federal Constitution which was thereby drawn in question; and moreover the said Hansberrys, petitioners, were denied due process of law and the equal protection of the laws, and their rights, privileges, and immunities as citizens of the United States were abridged. See Delmar Jockey Club in Missouri, 210 U. S. 324 at 335.

The petitioners set up and claimed specially under the 14th Amendment to the Federal Constitution certain rights, titles, privileges and immunities which they asserted were denied and abridged by the enforcement, by the State's Judicial officers and courts, of a harsh, oppressive and discriminatory property owner's covenant, and the 14th Amendment to the Federal Constitution was thereby necessarily drawn in question by the decree and judgment of the Illinois Supreme Court in sustaining the lower court's decree. See *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226 at 233-35; *Home Telegraph, etc.* v. *Los Angeles,* 227 U. S. 278; *Ex parte Virginia,* 100 U. S. 339; *Strauder* v. *West Virginia,* 100 U. S. 303; *Carter* v. *Texas,* 177 U. S. 442; *Colgate* v. *Harvey,* 296 U. S. 404, at 430-433.

The petitioners' rights to due process of law were denied and abridged by the affirmance of the decree of the trial court which reluctantly held that *Burke* v. *Klei-*

man, though a fraudulent and collusive suit, was *res judicata* and therefore binding upon the petitioners in the instant case. See *Lord* v. *Veazie,* 8 Howard 251 at 255; *Michaels* v. *Post,* 21 Wall. 298; *Beale* v. *Ill. M. & T. R. Co.,* 133 U. S. 290; *Riehle* v. *Margolies,* 279 U. S. 219.

The rights of the petitioner Katz to due process of law were denied and abridged in that the decree enjoined said Katz without any evidence whatsoever in support of said injunction so that said decree amounted to an arbitrary and capricious judicial seizure of Katz' property. See *Delmar Jockey Club* v. *Missouri,* 210 U. S. 324 at 335; *Norris* v. *Alabama,* 294 U. S. 578 at 590; *Creswill* v. *Knights of Pythias,* 225 U. S. 246 at 261; *Truax* v. *Corrigan,* 257 U. S. 312 at 324-5.

The petitioners' rights to due process of law were denied and abridged in that the decree of *Burke* v. *Kleiman,* a void judgment, or decree was pleaded and sustained as *res judicata* against them. The decree in the instant case found that *Burke* v. *Kleiman* was a class suit and therefore binding upon the petitioners herein, although no class in fact ever existed, as shown by the finding of the trial chancellor both in his oral opinion and decree that the agreement sought to be specifically enforced was executed by 54% of the frontage instead of 95%, as required by its own terms. The court in *Burke* v. *Kleiman* lacked jurisdiction of the parties and the subject matter because the agreement sought to be enforced had never become operative by its own terms. See *Christopher* v. *Brussellback,* 302 U. S. 500; *Old Wayne Life Ass'n of Ind.* v. *McDonough,* 204 U. S. 8 at 15-17, 23; *Scott* v. *McNeal,* 154 U. S. 34 at 45, 46.

The petitioners raised the Federal questions sought

to be reviewed by filing their several and respective motions to strike and dismiss the respondents' suit, in which they contended that the enforcement of the restrictive agreement violated the 14th Amendment and Sections 1977 and 1978 of the Revised Statutes and was contrary to the aims, purposes and objects as expressed in the Federal Constitution. (Rec. 22-28.) The trial court overruled the petitioners' several and respective motions to strike and dismiss. (Rec. 29.)

The petitioners then filed their several and respective answers, setting up the same Federal questions. (Rec. 32-47, 56-58, 78-91.) The petitioners likewise filed their several and respective motions to dissolve (Rec. 48-50), again asserting the Federal questions sought to be reviewed here. To the defendants' plea of *res judicata* raised in their reply, the defendants filed their several and respective rejoinders to said reply, denying that they had been estopped upon the basis of said decree of *Burke* v. *Kleiman*, and further asserted that the sustaining of a plea of *res judicata* and any estoppel against them would deny them of due process of law and the equal protection of the laws in violation of the 14th Amendment. (Rec. 72-75, 91-101.)

The trial chancellor in his decree (Rec. 102-125), sustained the plea of *res judicata* in the reply and sustained the objections to the defendants' answers in which they had asserted the Federal Constitutional questions above set up. (Rec. 119, 121-122.)

Upon the trial of the cause the defendants objected to the introduction of Plaintiffs' Exhibit No. 5 (Rec. 197-201, 451-461) (which was the alleged restrictive agreement), on the Federal grounds above asserted. The trial court overruled said objections and allowed the introduction of the said restrictive agreement in evidence against

the petitioners. (Rec. 200-201.) The trial court in its decree found that the enforcement of the restrictive agreement did not violate any article of the Constitution of the United States and is not unconstitutional; that it was not against public welfare; that it did not deprive the petitioners of any of their equal or civil rights nor did it deprive the petitioners or Negroes as a class, of due process of law under the Federal Constitution, and then proceeded to sustain the plea of *res judicata* as well as the objections of the plaintiffs to the answer of the petitioners. (Rec. 121-122.)

The petitioners again raised the above mentioned Federal Constitutional questions in their appeal to the Supreme Court of Illinois, and as provided in the rules of the Supreme Court of Illinois, assigned these errors in a portion of their brief entitled "Errors relied upon for reversal". The petition for rehearing in the Supreme Court of Illinois, raised the same Federal Constitutional question.

The affirmance by the Supreme Court of Illinois, of the decree of the trial chancellor who had ruled adversely on the Federal Constitutional questions raised by the petitioners, necessarily involved substantial Federal questions, the disposition of which were necessary to a determination of the case.

III.

QUESTIONS PRESENTED.

1. Assuming that there is a property owners' agreement among 500 or more different property owners owning 500 or more different and dissimilar parcels of real estate whereby the sale and leasing of real estate to

Negroes is prohibited solely on account of their race or color, and assuming also *that one property owner sues another property owner for specific performance of said restrictive agreement in respect to one parcel of property,* and said suit shows on its face that there is a dispute, conflict of interest, and diversity of opinion in respect to its enforcement, can such a suit, wherein one property owner sues another to the injury and detriment of the latter, be a class or representative action so that the decree in the first suit will thereafter in a second suit between still different property owners, estop, bind and conclude persons and their privies, not parties to or served with summons or process, on the theory of *res judicata?*

(a) Where a decree finds a property owners' covenant to be in full force and effect on the basis of a false stipulation of facts, and in a second suit involving the same property owners' covenant, it is proved beyond any question of doubt that such covenant never came into being or force or effect and was invalid according to its own terms because the required frontage consent had never in fact been obtained, can such a decree be *res judicata* on the theory that the first action was a representative or class suit, when in truth and in fact no class ever existed, there being no covenant in fact? And did the court in said first suit ever have jurisdiction to bind any person, especially persons and their privies not parties and not served with summons and process?

2. Whether the proceedings, suit and decree in the case of *Burke* v. *Kleiman* found by the trial chancellor in the instant case to have been collusively and fraudulently brought and obtained may be pleaded as *res judicata.*

3. Whether the enforcement, by the State courts, by means of a mandatory injunction, of a harsh, oppressive and discriminatory restrictive agreement among property owners wherein Negroes are prohibited from owning and occupying real estate solely on account of their race or color, deprives the petitioners of due process of law, the equal protection of the laws, and likewise abridges their privileges and immunities as citizens of the United States in violation of the 14th Amendment to the Federal Constitution, and is in further violation of Secs. 1977 and 1978 of Revised United States Statutes; and whether such enforcement is contrary to the natural and inalienable rights of petitioners as citizens of the United States under the 14th Amendment.

4. Whether the decree which directed the Hansberrys to convey their three-apartment building at 6140 Rhodes Avenue to a white person within thirty days, and upon failure so to do, directed a Master in Chancery of said court to convey the same to Jay B. Crook, a white person, without providing for compensation to said Hansberrys (and said decree being actually executed by said Master in Chancery), is so plainly arbitrary, contrary to law and capricious as to amount to a mere spoliation of said petitioners and the taking of their property without due process of law in violation of the 14th Amendment to the United States Constitution.

5. Whether the decree enjoining Israel Katz, which was entered without any evidence whatsoever, is so plainly arbitrary and contrary to law, as to amount to a mere spoliation of the petitioner Katz, and a capricious and arbitrary judicial seizure of his property and a denial of his rights without due process of law in violation of the 14th Amendment to the Federal Constitution.

6. Whether the decree in enjoining Supreme Liberty Life Insurance Company, mortgagee, and Harry H. Pace, sued as its president, from making mortgage loans in said restricted area, although the agreement sought to be enforced expressly exempted mortgages from its operation, is so plainly arbitrary, unreasonable and contrary to law as to amount to a spoliation of the petitioners, Supreme Liberty Life Insurance Company and Harry H. Pace, its president, and a deprivation of their rights and property without due process of law in violation of the 14th Amendment to the United States Constitution.

IV.

REASONS RELIED FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

1. The decision of the Supreme Court of Illinois in affirming the decree of the court below, is probably not in accord with the following applicable decision of this Court:

Wabash Railway Co. v. *Adelbert College,* 208 U. S. 38 at 57, 59.

Hartford Life Ins. Co. v. *Ibs,* 237 U. S. 662 at 617.

Hamer v. *New York Railways Co.,* 244 U. S. 266 at 273.

Christopher v. *Brusselback,* 302 U. S. 500.

Smith v. *Swormstedt,* 16 Howard 288 at 303.

Scott v. *Donald,* 165 U. S. 107, at 115-117.

Postal Telegraph Cable Co. v. *Newport,* 247 U. S. 464 at 475.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill,* 281 U. S. 673 at 682.

Matthews v. *Rodgers,* 284 U. S. 521 at 529-30.

Williams v. *Gibbs,* 17 Howard 239 at 254-7.

Boswell v. *Otis*, 9 Howard 336 at 348.
Scott v. *McNeal*, 154 U. S. 34 at 45, 46.
Pennoyer v. *Neff*, 95 U. S. 714 at 727, 733.

The decision of the Supreme Court of Illinois in holding that the property owners agreement among 500 or more different property owners owning 500 or more different and dissimilar parcels of property was a proper subject matter of a representative or class action is not in accord with the decision of this court in *Wabash Railway Co.* v. *Adelbert College, supra; Hartford Life Ins. Co.* v. *Ibs; Hamer* v. *New York Railways Co. supra, which hold that there must be some common subject matter and identical interest, and that in order to have a class suit, some member of the class must be suing or defending on behalf of all the members of the class, and further, that one member of a class cannot sue those whom he purports to represent in a class suit.* The decision of the Supreme Court of Illinois in sustaining a plea of *res judicata* against the petitioners is not in accord with the decision of this court in *Postal Telegraph Cable Co.* v. *Newport, supra*, which holds that the doctrine of *res judicata* cannot be invoked against persons and their privies who have not been served with process or summons and who have not had their day in court and a real opportunity to defend.

(a) In holding *Burke* v. *Kleiman* to be a representative suit or class action and the decree therein to be *res judicata* against petitioners when in truth and in fact there was no valid agreement according to its own terms, the Supreme Court of Illinois decided the case in a way not in accord with the decision of this court:

See:

Matthews v. *Rodgers, supra.*
Christopher v. *Brusselback*, 302 U. S. 500, 58 Sct. 350.

Scott v. *McNeal, supra, Hovey* v. *Elliot,* 167 U. S. 409, 17 Sct. 841.

Simon v. *Southern Ry. Co.,* 236 U. S. 115 at 122, 132.

Old Wayne Mutual Life Ass'n of Ind. v. *McDonough,* 204 U. S. 8 at 15-17, 23.

There was no jurisdiction to bind the petitioners and their privies not parties and not served with process, and there being no agreement and therefore, no class, the decree in *Burke* v. *Kleiman* was therefore void.

See:

Christopher v. *Brusselback,* 302 U. S. 500.

Matthew v. *Rodgers, supra.*

Scott v. *Donald,* 165 U. S. 115-117.

Scott v. *McNeal, supra.*

Hovey v. *Elliot, supra.*

Simons v. *Southern Ry. Co., supra.*

Old Wayne Mutual Life Ass'n of Ind. v. *McDonough,* 204 U. S. 8 at 15-17, 23.

2. The decision of the Supreme Court of Illinois in sustaining a plea of *res adjudicata* based on the fraudulent decree of *Burke* v. *Kleiman* is not in accord with the applicable decisions of this court:

See:

Lord v. *Veazie,* 8 Howard 251 at 255.

Michaels v. *Post,* 21 Wall. 398,

which hold that a fraudulent and collusive decree and judgment may be attacked collaterally.

See:

Beals v. *Ill. M. & T. R. Co.,* 133 U. S. 290.

Riehle v. *Margolies,* 279 U. S. 218.

3. In enforcing the restrictive agreement the State court and State judicial officers have deprived the petitioners of their rights and property without due process

of law, and abridged their privileges and immunities as well as denied them the equal protection of the laws in violation of the 14th Amendment in a manner probably not in accord with the applicable decisions of this court in the following cases:

Chicago Burlington & Quincy R. Co. v. *Chicago,* 166 U. S. 226 at 233-235.

Home Telegraph Etc. v. *Los Angeles,* 227 U. S. 278.

Ex parte Virginia, 100 U. S. 339.

Strauder v. *West Virginia,* 100 U. S. 303.

Neal v. *Delaware,* 103 U. S. 370.

Carter v. *Texas,* 177 U. S. 442.

In enforcing the harsh, oppressive and discriminatory restrictive agreement, the Supreme Court of Illinois abridged the privileges and immunities of petitioners as citizens of the United States in violation of the 14th Amendment and Sections 1977 and 1978 in a manner not in accord with the applicable decision of *Colgate* v. *Harvey,* 296 U. S. 404 at 430-433, wherein the Supreme Court of the United States held that citizens of the United States by virtue of their National Citizenship derived under the 14th Amendment have the privilege and immunity of buying, selling and contracting for property without discrimination.

4. In affirming the decree which took the Hansberry's property without compensation, the Supreme Court of Illinois probably decided the case in a manner not in accord with an applicable decision of this court: *Delmar Jockey Club* v. *Missouri,* 210 U. S. 324 at 335, in which the court held that a decree which is so arbitrary and so contrary to law as to amount to a spoliation, deprives a litigant of his property without due process of law in violation of the 14th Amendment.

5. In affirming the decree enjoining Katz, the Supreme Court of Illinois decided the case in a manner not in accord with the case of *Delmar Jockey Club* v. *Missouri, supra,* and probably not in accord with the cases of *Norris* v. *Alabama,* 294 U. S. 578; *Creswell* v. *Knights of Pythias,* 225 U. S. 246 at 261; *Truax* v. *Corrigan,* 257 U. S. 312, 324-5, which hold that where findings of fact are made without any evidence whatsoever to support them the Federal right has nevertheless been denied and this court must examine the facts to determine whether the Federal right has been denied.

6. In deciding that the enforcement of the harsh, oppressive and discriminatory restrictive agreement is not against the general welfare of the Nation and not contrary to the aims, purposes and objects of the Federal Government, the Supreme Court of Illinois has decided a Federal question of substance not heretofore decided by this court. See *Colgate* v. *Harvey,* 296 U. S. 404.

7. In affirming the decree enjoining Supreme Liberty Life Insurance Company, mortgagee, and Harry H. Pace, sued as its president, from making mortgage loans in said restricted area, the Supreme Court of Illinois denied the case in a manner not in accord with the case of *Delmar Jockey Club* v. *Missouri, supra,* in that the said decree as to these petitioners was so contrary to law and so manifestly unreasonable and arbitrary as to amount to a spoliation in that it prevented them from making mortgage loans in said area and obtaining earnings from mortgage investments, although the agreement itself expressly exempted mortgagees from its operation.

8. In deciding that a property owner's restrictive agreement may be the subject matter of a class or representa-

tive suit, which may be used as *res judicata* against persons not parties or privies and not served with summons or process, the Supreme Court of Illinois has decided a Federal question of substance not yet decided by this court. The necessary effect of the decision of the Supreme Court of Illinois will be to unsettle and to cloud a great part of the land titles in Illinois and many states of the Union. Collusive and fraudulent suits will be encouraged and all of the ancient rights of due process will be destroyed by the resort to the technical doctrine of *res judicata* which will foreclose every one of his right and opportunity to be heard. See *Lord* v. *Veazie,* 8 Howard, 251 at 255; *Geter* v. *Hewitt,* 22 Howard 364. If the decision is allowed to stand, no person, black or white, will be safe in his person, property or his rights. If class suits can be maintained in respect to property owners' covenants involving many parcels of property, then some property owners will thus be enabled to destroy the property rights of others while thus purporting to represent them in the class suit and while they are not parties and are without an opportunity to defend.

This court has not yet decided whether the right to own and hold property is a natural and inalienable right, privilege and immunity of a citizen of the United States by virtue of National citizenship and a right which may not be abridged and denied by the judicial recognition and judicial action of the State Courts in enforcing discriminatory agreements which would deny the natural and inalienable right of a citizen to own and hold property.

WHEREFORE, it is respectfully submitted that this peti-

tion for certiorari to review the judgment and decree of the Supreme Court of Illinois, should be granted.

CARL A. HANSBERRY,
NANNIE L. HANSBERRY,
SUPREME LIBERTY LIFE INSURANCE COMPANY,
HARRY H. PACE,
JAMES J. BURKE,
ISRAEL KATZ.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Opinion of Court Below.

(Majority and Dissenting Opinion.)

The opinion of the Supreme Court of Illinois is reported in 372 Ill., page 369, of the Illinois Reports, and also in 24 N. E. 2nd, page 37, as well as in the record filed in this cause. (Rec. 464, 469.)

JURISDICTION.

1. The jurisdiction of this court is based upon judicial code Section 237b as amended by the Act of February 13, 1925. Federal Code Annotated, Title 28, Vol. 8, page 44, Section 344b.

2. The original date of the judgment or decree to be reversed, is October 10th, 1939. (Rec. . .) Petition for rehearing was filed November 4th, 1939, within the time provided by the rules of the Supreme Court of Illinois, and the petition for rehearing was denied December 13, 1939. (Rec. . .)

3. The 14th Amendment to the Constitution of the United States, Sections 1977 and 1978 of the Revised United States Statutes, and the Preamble and the Bill of Rights to the Federal Constitution were drawn in question by the petitioners who specially set up and claimed rights, privileges and immunities thereunder, which were denied by the courts below in various rulings.

STATEMENT OF THE CASE.

The essential facts of the case are fully stated in the accompanying petition for certiorari, which also contains a full statement of the questions presented, and in the interest of brevity are not repeated here. Any necessary elaborations on the evidence on the points involved will be made in the course of argument which follows.

SPECIFICATIONS OF ERRORS.

The Supreme Court of Illinois erred:

1. In affirming the decree of the Circuit Court of Cook County, Illinois, which found the case of *Burke* v. *Kleiman* to be a representative or class action, and in sustaining said decree as *res judicata* against the petitioners in the instant case.

(a) In affirming the decree of the Circuit Court of Cook County, Illinois, which found that *Burke* v. *Kleiman* was a class suit, although it found also that there never was a valid agreement and never in fact any class, and as a consequence, erred in sustaining the plea of *res judicata* on the basis of the decree of *Burke* v. *Kleiman.*

(b) And erred in not finding that the decree of *Burke* v. *Kleiman* was fraudulent, void, and entered without jurisdiction to bind any of the parties thereto or the petitioners.

2. In sustaining the plea of *res judicata* upon the basis of a decree and proceedings fraudulently and collusively brought and obtained.

3. In enforcing the harsh, oppressive and discriminatory restrictive agreement in deprivation of the petitioners' rights and property without due process of law,

thereby denying the equal protection of the laws and abridging their privileges and immunities in violation of the 14th Amendment to the United States Constitution.

4. In enforcing the restrictive agreement against the petitioners in violation of Section 1977 and 1978 of the Revised United States Statutes.

5. In affirming the decree which deprived the Hansberrys of their property without compensation, in violation of their rights to due process of law under the 14th Amendment to the Federal Constitution.

6. In affirming the decree enjoining Israel Katz in an arbitrary and capricious manner, and without any evidence whatsoever, in deprivation of his rights and property without due process of law in violation of the 14th Amendment to the Federal Constitution.

7. In affirming the decree which enforced a harsh, oppressive and discriminatory restrictive agreement, which is against the public policy of the United States as expressed in Sections 1977 and 1978 of the Revised United States Statutes, the Federal Bill of Rights and the 14th Amendment, and which is likewise contrary to the natural and inalienable rights of the petitioners as citizens of the United States, contrary to the general welfare, and contrary to the aims, purposes and objects and the Federal Constitution as expressed in its preamble to the 14th Amendment.

8. In affirming the decree enjoining Supreme Liberty Life Insurance Company, mortgagee and Harry H. Pace, sued as its president from making mortgage loans in said restricted area, although the agreement sought to be enforced expressly exempts mortgagees from its operation.

SUMMARY OF THE ARGUMENT.

I. A property owner's restrictive agreement between 500 or more different owners owning 500 or more different and dissimilar parcels of real estate cannot be the subject matter of a class or representative suit, there being no common subject matter and no identity of interest among them. The case of *Burke* v. *Kleiman* in which one property owner was suing another property owner to the injury and detriment of the latter and where there was a dispute, conflict of interest and diversity of opinion as to the enforcement of the agreement was not a representative or class suit, and the decree therein could not bind the privies or the petitioners herein who were not parties and not served with process or summons, on the theory of *res judicata.*

A. The decree enjoining Supreme Liberty Life Insurance Company, as mortgagee and Harry H. Pace, sued as its president was manifestly erroneous and so unreasonable and arbitrary as to deny these petitioners of their rights and property without due process of law, particularly in that the agreement sought to be enforced specifically exempted mortgagees from its operation.

B. The decree in *Burke* v. *Kleiman* could not be *res judicata* as to petitioners and their privies not parties to nor served with process therein, because there was no existing class, it having been proved in the instant case that there was no agreement in fact among the property owners, and as a consequence the court did not have jurisdiction to bind any one, and especially not the petitioners

and their privies who were not parties and not served with summons or process in said case, and said decree of *Burke* v. *Kleiman* was therefore void and could not be *res judicata.*

II. The proceedings and the decree in the case of *Burke* v. *Kleiman* found by the trial chancellor to have been fraudulently and collusively brought and obtained upon the basis of a false stipulation of facts that the required frontage consent had been obtained, cannot be *res judicata* against any one, and especially not against the petitioners and their privies who were not parties and were not served with summons or process in said suit and given a real opportunity to defend.

III. The enforcement, by the State courts by means of a mandatory injunction of a harsh, oppressive and discriminatory restrictive agreement among property owners wherein Negroes are prohibited from owning and occupying real estate solely on account of their race or color, deprives the petitioners of due process of law, the equal protection of the laws, and likewise abridges their privileges and immunities as citizens of the United States in violation of the 14th Amendment to the Federal Constitution, and is in further violation of Secs. 1977 and 1978 of Revised United States Statutes; such enforcement is contrary to the natural and inalienable rights of petitioners as citizens of the United States under the 14th Amendment.

IV. The decree of the State Courts which deprived the Hansberrys of their property without compensation was so arbitrary and contrary to law as to amount to a mere spoliation in violation of their rights to due process of law under the 14th Amendment to the Federal Constitution.

V. The decree of the State Courts enjoining Israel Katz, having been entered without any evidence whatsoever, is so plainly arbitrary and contrary to law, as to amount to a mere spoliation of the petitioner Katz and as a consequence was an arbitrary and capricious judicial seizure of his property and a denial of his rights without due process of law in violation of the 14th Amendment to the Federal Constitution.

ARGUMENT.

I. A property owner's restrictive agreement between 500 or more different owners owning 500 or more different and dissimilar parcels of real estate cannot be the subject matter of a class or representative suit, for there must be a common subject matter or identical interest among all the members of the class. See *Smith* v. *Swormstedt*, 16 Howard 288 at 303; *Wabash Railway Company* v. *Adelbert College*, 208 U. S. 38 at 57-59; *Hartford Life Ins. Co.* v. *Ibs.*, 237 U. S. 662 at 671; *Christopher* v. *Brusselback*, 302 U. S. 500 at 505. The plaintiff who brings a class suit must sue or defend for the benefit of *all*. A mere common interest in the *question* involved is not enough upon which to base a representative or class suit. See:

Story, 6th Ed., Sec. 97, p. 109.
Moore's Federal Practice, Vol. 2, p. 2236.
Hale v. *Hale*, 146 Ill. 227, 258.
Weberpals v. *Jenny*, 300 Ill. 156.

Nor is mere numerousness of parties sufficient for the bringing of a class or representative action. See *Matthews* v. *Rodgers*, 284 U. S. 521 at 529-30.

The proceedings and decree in the case of *Burke* v. *Kleiman* pleaded as *res judicata* was a situation where one property owner was suing another property owner to the detriment and injury of the latter to enforce the terms of an alleged restrictive agreement to which the grantors of both were purportedly parties signatory. In other words, the plaintiff, Burke, was not representing the defendant, Kleiman, in respect to any common subject matter for the benefit of all involved, but on the contrary, was engaged in a supposed dispute involving a different and diversity of interest and conflict of interest

between the plaintiff Burke and the defendant, Kleiman on the matter of leasing the one parcel of property involved, owned by the Kleimans, to Negroes or colored people. (Rec. 312-337.) There was no common subject matter, but apparently a sharp conflict of interest and opinion in respect to the enforcement of the restrictive agreement by the plaintiff Burke and against the defendant Kleiman. Consequently, the case of *Burke* v. *Kleiman* could not possibly be a representative or class action, and since neither the petitioners nor any of their grantors were parties to that action, nor served with summons or process, the decree of *Burke* v. *Kleiman* could not in the absence of the petitioners or their grantors bind, conclude and estop the petitioners or their grantors as *res judicata;* and both the trial court and the Supreme Court of Illinois erred in finding that decree binding thereby depriving petitioners of their rights and property without due process of law in violation of the 14th Amendment.

A property owner's restrictive covenant, which involves 500 or more different owners owning dissimilar parcels of real estate, all of which are differently situated, some with mortgages upon them, and some free and clear of encumbrances, some heavily burdened by taxes, and some not, some large, and some small, some homes and residences and some apartment buildings and commercial properties, some owned by private individuals and others by banks and insurance companies, some close to and adjacent to colored people and some far away, some owned by minors, guardians or trustees, some owned by hotels or inns under a statutory duty imposed by the Civil Rights Act of the State of Illinois to admit all persons without regard to race or color, some owned by hospitals under a like statutory duty to admit all persons, some wishing to enforce the agreement and others not, inherently cannot be the subject matter of a representative

or class action, because there can be no common or identical interest between the property owners, and because instead of one common subject matter, there are 500 or more different subject matters, namely: 500 or more parcels of property. In the instant case, the Supreme Court of Illinois has affirmed a decree which held a suit to be representative where the plaintiff Burke was suing another member of a class whom the plaintiff purported to represent. An allegation in a complaint, that a plaintiff brings the action on behalf of himself and all others similarly situated, does not in itself make an action a class suit. See *Wabash Railway Co.* v. *Adelbert College,* 208 U. S. 38 at 57-59; *Hamer* v. *New York Railways Co.,* 244 U. S. 266 at 273.

In sustaining the plea of *res judicata* against the petitioners, when neither they nor their grantors were parties to the proceedings of *Burke* v. *Kleiman,* the courts below thereby denied the petitioners the right to notice, the right to a real opportunity to appear and defend, and the right to their day in court in violation of the due process clause of the 14th Amendment. See *Postal Telegraph Cable Co.* v. *Newport,* 247 U. S. 464 at 475; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 at 682; *Scott* v. *McNeal,* 154 U. S. 34 at 45, 46; *Pennoyer* v. *Neff,* 95 U. S. 714 at 727, 733.

Furthermore it should be borne in mind that in the *Burke* v. *Kleiman case* only one violation of the covenant was sought to be enjoined in respect to one parcel of property owned by the defendant Kleiman. Therefore, assuming for the moment that *Burke* v. *Kleiman* could have been a representative suit, the decree would have been binding only upon the *particular property* charged with the violation that being the only property within the jurisdiction of the court. It could not have been binding

upon all the lots in the area as it would have in effect prejudged many possible controversies not yet arisen in respect to more than 500 lot owners and alleged signatories to the covenant merely to settle the issues involved in the one case of *Burke* v. *Kleiman*. It would have prejudged all questions of execution on the part of any and all of the alleged signatories to the covenant; it would have prejudged all questions of authority on the part of agents, trustees, agents for corporations, guardians and minors or the like to execute the alleged covenant; it would have prejudged unforeseen facts and circumstances such as changes in the neighborhood which would have rendered enforcement of the alleged agreement so harsh, oppressive, unreasonable and burdensome as to make it unenforceable in a court of equity. See *Saunders* v. *Poland Park Company* (Md. Court of Appeals), 198 Atl. 269, in support of this proposition. See also *Pennoyer* v. *Neff*, 95 U. S. 714 at 733; *Boswell's Lessee* v. *Otis*, 9 Howard 336 U. S. at 347, 348, 350.

It therefore follows that *Burke* v. *Kleiman* could not be *res judicata* as to the properties involved in this case, the court not having jurisdiction of either the property or the parties. See *Boswell Lessee* v. *Otis, et al.*, 9 Howard 336 at 350.

A. Of all the petitioners entitled to urge full and complete defenses, certainly the petitioners, Supreme Liberty Life Insurance Company and Harry H. Pace, sued as its President were entitled to present them. Mortgagees were expressly exempt from the operation of the alleged agreement. (Rec. 452.) Not having purchased any property in the area and having acted only in a manner entirely lawful and permitted even under the alleged agreement and being authorized under the laws of the State

of Illinois to make mortgages on real estate, the arbitrary act of the court in applying the doctrine of *res adjudicata* was not merely erroneous but deprived these petitioners of their substantial, substantive rights and seriously interfered with and hampered their competitive opportunities to make earnings from investments. Certainly these petitioners had the right to be heard on the question whether this alleged covenant had ever been executed by the owners of 95% of the frontage in the area involved, but the court denied them such right when it sustained the plea of *res adjudicata* interposed by respondents. Petitioners were charged with conspiring to violate a covenant, which by the evidence adduced at the trial was shown conclusively and indubitably never to have existed. This was a direct denial of due process and we submit that such action cannot be countenanced by the highest tribunal of our nation.

B. In the instant case, the trial chancellor found that the restrictive agreement involved in this case and in *Burke* v. *Kleiman* was an invalid agreement because the required frontage consent of the owners of 95% of the frontage had never been obtained, but only 54%. (Rec. 266-267, 110.) Nevertheless the Chancellor found that *Burke* v. *Kleiman* was a representative or class action. (Rec. 118-119.) It is difficult to understand how any class could ever have existed when the condition precedent of frontage consent of 95% had never been complied with. The decree of *Burke* v. *Kleiman* was therefore, a void decree and the court had no jurisdiction to enter the decree therein. See *Scott* v. *McNeal*, 154 U. S. 34 at 45, 46; *Old Wayne Mutual Life Insurance Company of Ind.* v. *McDonough*, 204 U. S. 8 at 15-17, 23; *Matthews* v. *Rodgers*, 284 U. S. 521 at 529-30; *Christopher* v. *Brusselback*, 302 U. S. 500 at 505; *Hovey* v. *Elliot*, 167 U. S. 409.

Moreover, it is clear that each signer of the alleged restrictive agreement did not waive or surrender his right to contest the due and proper execution and acknowledgment of the said agreement, nor did he waive or surrender his right to contest compliance with the condition precedent to the agreement becoming operative—to-wit the execution and due acknowledgment of said agreement by the owners of 95% of the frontage. In these respects there could be no representation and the execution of the agreement might be contested by him, by any other, or by all of the purported signers whenever their property was sought to be charged or burdened. See *Christopher* v. *Brusselback*, 302 U. S. 500 at 503 to 505. In the instant case petitioner Katz denied the execution and acknowledgment of the agreement (Rec. 79, 81), and Eva Somerman, a witness for the respondents, the Hansberry's predecessor in title denied that she acknowledged the agreement (Rec. 130); and yet the holding by the court that *Burke* v. *Kleiman* was *res judicata* precluded the court from giving the proper consideration to their testimony.

The decree of the courts below in this case is therefore, void and entered without jurisdiction in violation of the due process clause of the 14th Amendment to the Constitution of the United States. See *Scott* v. *McNeal*, 154 U. S. 34 at 45, 46; *Postal Telegraph & Cable Co.* v. *Newport*, 247 U. S. 464 at 475; *Brinkerhoff-Faris Trust and Savings Bank* v. *Hill*, 281 U. S. 673 at 682.

II. The trial chancellor found the proceedings in the case of *Burke* v. *Kleiman* to have been fraudulently and collusively brought and the decree therein to have been fraudulently and collusively obtained upon the basis of a false stipulation of facts between the attorneys that the required frontage consent of 95% had been obtained al-

though only 54% of the frontage by ownership had ever consented. (Rec. 118-119, 266-268.) Nevertheless, the Chancellor held this fraudulently decree to be *res judicata* between the petitioners. The law is well settled that a fraudulent or collusive decree cannot be pleaded as *res judicata.* See *Lord* v. *Veazie,* 8 Howard 251 at 255; *Beals* v. *Ill. M. & T. R. Co.,* 133 U. S. 290; *Riehle* v. *Margolies,* 279 U. S. 218. Further it has been decided by this court in the case of *Michael* v. *Post,* 21 Wall. 398, that such a fraudulent and collusive decree and judgment is void and may be attacked collaterally. Affirmance of this decree by the Supreme Court of Illinois was consequently a denial of due process to the petitioners in violation of the 14th Amendment. It is true that the Supreme Court of Illinois stated that there was no evidence of fraud in the decree and proceedings in *Burke* v. *Kleiman* but said statement was wholly unsupported by the evidence adduced and was inconsistent with the facts and findings of the trial chancellor. In making such a statement that there was no evidence of fraud in the case of *Burke* v. *Kleiman* a substantial Federal right of the petitioners was thereby denied in violation of the due process clause of the 14th Amendment. Since the finding of the majority of the Supreme Court of Illinois was not only contrary to the finding of the trial chancellor, contrary to law but was likewise wholly without basis of any facts or evidence to sustain it. The majority opinion of the Supreme Court of Illinois has also misapprehended the very well established rule of law that a collusive and fraudulent decree cannot be pleaded *res judicata.* The chancellor found that a fraudulent and collusive suit was brought by *Burke* v. *Kleiman* (Rec. 266-268), that a false stipulation was signed by the attorneys one of whom entered an appearance for Isaac Kleiman and James Lowell Hall,

defendants, who testified that they did not employ any lawyers to represent them (Rec. 237-238) and had not authorized any lawyer to sign a stipulation in their behalf. (Rec. ..)

The Notary Public who took the acknowledgment of Olive Ida Burke to the complaint filed in the case of *Burke* v. *Kleiman,* was Fred L. Helman (Rec. 329), who was at the time of the filing of the case of *Burke* v. *Kleiman,* the Executive Secretary of the Woodlawn Property Owners Association, the object of which was the enforcement of the agreement involved in that case and in the case at bar. (Rec. 283.) Helman, in an uncontradicted affidavit appearing of record, stated positively under oath, that he was instrumental in attempting to create the restrictive agreement, and that after its filing on February 1, 1928, that he made an investigation of his own notes and papers and records of the Recorder's Office and found that the restrictive agreement had not been signed by the required frontage consent of 95% and found that the restrictive agreement had never in fact come into force or effect. (Rec. 284-286.) Helman further stated that he had supervised the filing of the case of *Burke* v. *Kleiman* in 1932 to enforce the restrictive agreement which had already been known by him for at least three and a half years not to exist. (Rec. 286, 284.) He paid the court costs and generally supervised the prosecution of the case as well as conferred with the officials of the Woodlawn Property Owners Association. (Rec. 286.) In addition to these facts, the respondents made no effort to prove the existence of any restrictive agreement, but relied wholly upon the technical doctrine of *res judicata.* Under such circumstances, the Supreme Court of Illinois in its majority opinion, finds that there is no fraud in the case of *Burke* v. *Kleiman.* In other words, there was no real or

actual controversy between the parties nominally opposed to each other in *Burke* v. *Kleiman* and the litigation was in fact carried on under the direction of the plaintiff and the Woodlawn Property Owners Association, which controlled the litigation on both sides, with a view of obtaining an opinion on a matter of law and an adjudication of a non-existent fact in a manner and way pre-determined by themselves to the injury of every purported party signatory to the alleged restrictive agreement. *Hatfield* v. *King,* 184 U. S. 163 at 165.

It has been decided repeatedly by this court, that where it is asserted that a federal right has been violated, that this court will, and must, examine the facts and the record to ascertain whether or not the federal right has in substance and effect been denied. See *Norris* v. *Alabama,* 294 U. S. 587 at 590; *Creswell* v. *Knights of Pythias,* 225 U. S. 246 at 261; *Postal Telegram Cable Co.* v. *Newport,* 247 U. S. 464 at 473; *Carlson* v. *Curtis,* 234 U. S. 103 at 106; *Southern Pacific R. R. Co.* v. *Schuyler,* 277 U. S. 601 at 611.

III. The enforcement by the State's judicial officers, agencies and courts, of such a harsh, oppressive and discriminatory agreement is state action, and therefore, a denial of the petitioners' right to due process of law in violation of the 14th Amendment to the Constitution. See *Brinkerhof-Faris Trust and Savings Co.* v. *Hill,* 281 U. S. 673 at 682; *Carter* v. *Texas,* 177 U. S. 442; *Gandolfo* v. *Hartman,* 49 Fed. 181; *Ex parte Virginia,* 100 U. S. 339. It would be therefore, a very narrow and strained construction of the 14th Amendment to hold that while the state and the municipal legislatures are forbidden to discriminate against citizens in their legislation, that nevertheless the state courts by their judicial recognition and participation in such agreements, could nevertheless by

their state action do something which the sovereign legislature might not do. See *Gandolfo* v. *Hartman*, 49 Fed. 181. It is one thing to say that citizens may do with their property what they please and enter into such harsh, oppressive and discriminatory restrictive agreements, as such agreements among themselves might give certain sanctions among themselves, and a certain desired effect in respect to dealing with their own property, however, when the state, through its courts, enforces such harsh, oppressive, and discriminatory restrictive agreements, it is thereby providing the necessary state action which violates the 14th Amendment. See *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 227 at 233 to 235, which holds that the Amendment may be violated by the judicial authorities of the state as well as by the legislature and executive branches, and further, that whoever acts in the name and for the state, is clothed with the state's power, and is acting for the state. The petitioners contend that it is the *enforcement* of this harsh, oppressive and discriminatory restrictive agreement against citizens of the United States by the judicial authorities of the state, which violates the 14th Amendment. See *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S. 673 at 682; *Carter* v. *Texas*, 177 U. S. 442; *Strauder* v. *West Virginia*, 100 U. S. 303.

The restrictive agreement by its own terms required the use of the State's public offices for its creation and enforcement; and the state thereby became a necessary part of it. The agreement provided that it should be of no force or effect unless it was recorded in the office of the Recorder of Deeds of Cook County, Illinois. It further provided that the agreement may be enforced by any permissible legal or equitable proceedings, including proceedings to enjoin violation and for specific performance.

Hence it looked forward to and depended for its efficacy upon its enforcement by the state judicial officers, agencies and governmental machinery. The state was therefore, an active party and contemplated as such in this agreement, and when these individuals entered into such an agreement and provided for the active participation of the State in the creation of the agreement and other enforcement thereof, the state thereby became so integral a part of said agreement, that its enforcement would amount to State action and the violation of the 14th Amendment to the Constitution of the United States. See *Chicago, Burlington & Quincy Railroad* v. *Chicago,* 166 U. S. 227, at 233 to 235; *Ex parte Virginia,* 100 U. S. 339; *Carter* v. *Texas,* 177 U. S. 442.

Sections 1977 and 1978 of the United States Revised Statutes (Title 8, U. S. C. A., 41, 42) passed pursuant to the 14th Amendment, are as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other."
>
> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

It has been held by this court that a right which arises under the Constitution and Laws of the United States is a privilege and immunity which will be protected by the 14th Amendment. *Twining* v. *New Jersey,* 211 U. S. 78. When the petitioners Hansberry purchased the property

at 6140 Rhodes Avenue, they exercised their national citizenship conferred by the above statute and the 14th Amendment. The right to own and occupy real estate is a privilege and immunity acquired by reason of the petitioners' national citizenship under the 14th Amendment to the Constitution. The very status of national citizenship connotes equality of rights and privileges so far as they flow from such citizenship, everywhere within the limits of the United States, and further, that the 14th Amendment in effect makes that citizenship "paramount and dominant" instead of "derivative and dependent" upon state citizenship. See *Colgate* v. *Harvey*, 296 U. S. 404.

And furthermore the enforcement of an agreement which prohibits ownership of real property by a citizen of the United States is contrary to the natural and inalienable rights of a citizen by virtue of his national citizenship under the 14th Amendment. See *Colgate* v. *Harvey*, 296 U. S. 404 at 430, 431, 433.

IV. The decree entered by the trial chancellor and affirmed by the Supreme Court of Illinois, directed the Hansberrys to give their property to some white person without providing for any compensation. This action of the state courts is pure and unadulterated confiscation of the building and property of the Hansberrys and is a manifest violation of the 14th Amendment to the Federal Constitution. This decree is so plainly arbitrary and so contrary to law as to amount to a mere spoliation. See *Delmar Jockey Club* v. *Missouri*, 210 U. S. 324 at 335.

V. The decree of the State Court enjoining Israel Katz is so plainly arbitrary and contrary to law and without basis of evidence as to amount to a mere spoliation of the petitioner and as a consequence was an arbitrary and capricious judicial seizure of his property and

denial of his rights without due process of law in violation of the 14th Amendment to the Federal Constitution.

The complaint of the respondents charged that the petitioner Katz, listed his property for sale with James J. Burke, and that he made threats to sell his property to colored people. Katz testified that he never at any time had any conversation with James J. Burke about the sale of his property at 6018 Vernon Avenue (Rec. 239), *and this fact was never rebutted in any manner whatsoever by the respondents.* The complaint also charged that Katz made threats to sell his property. (Rec. 17-18.) No threats by Katz whatsoever were ever proved. The respondents merely offered the following things as evidence of threats by Katz: That Katz was subpoenaed as a witness in a proceeding before the State Department of Registration and Education in February or July, 1937, according to respondents' witness Raymond (Rec. 169-170); that while testifying as a witness in this proceeding against William I. Sexton, a real estate broker, Attorney Harry E. Raymond, one of the attorneys for the respondents as shown by the record in this case, and one of the attorneys for the plaintiff in the case of *Burke* v. *Kleiman,* asked Katz the following question: "Would you sell your property at 6018 Vernon Avenue to colored people, notwithstanding the agreement that is recorded in the particular district, Washington Park District, in which your property is located, and in which you the owner, then owner of this property was a signer for yourself?" And Katz said: "Yes. I would. I would sell it to anybody that I could get to purchase it. I would sell it now if I could." This was not a threat, but was an answer elicited by the respondents themselves or their agents from a witness who was subpoenaed by them and who was answering a *hypothetical* question put by their attorney. In other

words, the only evidence in the record as to any threat is a *privileged* statement made by the petitioner Katz, and *induced* by the respondents themselves while upon the witness stand in another proceeding in February, 1937 or July, 1937, as stated by the witness Raymond (Rec. ..). The witness Raymond was in utter confusion as to the date of this testimony by the petitioner Katz, and testified that it was made either February, 1937, which was at least four months prior to the filing of the injunction suit or in July, 1937, which would have been after the filing of the complaint in this cause, which was filed on June 7, 1937.

In other words, the supposed statement of Katz was not of such imminent or immediate pending nature that an injunction was necessary to protect the rights, if any, of the respondents. A substantial Federal right has been denied the petitioner Katz, and a decree of injunction has been issued against him without any real basis of evidence. In order to determine the violation of the Federal right asserted by the petitioner Katz, we submit that the court should examine the record for the purpose of determining the violation of the Federal right asserted. See *Norris* v. *Alabama*, 294 U. S. 587 at 590; *Creswill* v. *Knights of Pythias*, 225 U. S. 246 at 261; *Truax* v. *Corrigan*, 257 U. S. 312 at 324-325.

CONCLUSION.

It is therefore, respectfully submitted that this one calling for the exercise by this court of it visory powers in order that the errors herein out may be corrected; that the law may be prop authoritatively defined, and that the judgment an of the Circuit Court of Cook County, Illinois, an Supreme Court of Illinois should be reversed that justice may be done to your petitioners; to such an end a writ of certiorari should be gra this court should review the decision of the Court of Illinois and finally, reverse the same.

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APPENDIX.

OPINION OF THE SUPREME COURT OF ILLINOIS.

Majority Opinion.
Dissenting Opinion.

Docket No. 25116—Agenda 19—April, 1939.
Anna M. Lee *et al.*, Appellees, *v.* Carl A. Hansberry, *et al.*, Appellants.

MR. JUSTICE JONES delivered the opinion of the court:

Plaintiffs (appellees here), brought an action in the Circuit Court of Cook County for the purpose of enforcing a certain "restrictive agreement" concerning the real estate of approximately five hundred owners in the City of Chicago. The substance of this agreement, set forth *in haec verba* in *Burke* v. *Kleiman*, 277 Ill. App. 519, was that no part of the property restricted should be sold, leased to, or permitted to be occupied by any person of the colored race prior to January 1, 1948. The property covered by the agreement consists of approximately twenty-seven blocks and parts of blocks between Sixtieth and Sixty-third Streets, and between Cottage Grove and South Park Avenues in Chicago. The agreement contained the following provision: "This agreement and the restrictions herein contained shall be of no force or effect unless this agreement or a substantially similar agreement, shall be signed by the owners above enumerated of ninety-five per centum of the frontage above described, or their heirs or assigns, and recorded in the

office of the Recorder of Deeds of Cook County, Illinois, on or before December 31st, 1928."

The complaint alleged that the owners of ninety-five per cent of the frontage signed the agreement and that it was recorded February 1, 1928. It further alleged a conspiracy on the part of the defendants to destroy the agreement by selling or leasing property in the restricted area to Negroes. It charged that Eva Sommermon, one of the signers of the agreement, conveyed her property to one Stoltz, who, on the same day, conveyed it to the First National Bank of Englewood; that, through fraudulent concealment on the part of the defendants James J. Burke and Harry A. Pace, from the bank, of the face Hansberry was a Negro and that the property was being purchased for him, a deed was procured from the bank to Jay B. Crook, who, in fact, purchased for Hansberry; that the deed from the bank to Crook was not delivered until May 26, 1927, but that on May 19, 1937, Crook and his wife executed and delivered a trust deed to the Chicago Title and Trust Company, as trustee, to secure their note for $4,400 payable to defendant the Supreme Liberty Life Insurance Company, of which defendant, Pace, a colored attorney, was president. May 26, 1937, the day the deed was delivered, Hansberry and his family moved into the premises.

The answer of defendants denied that the owners of ninety-five per cent of the frontage described in the restrictive agreement had signed the agreement, and asserted the agreement never went into effect. It also denied the principal allegations of the complaint and set up several affirmative defenses. To the defense that the agreement was never executed plaintiff replied that that question was *res judicata*, having been determined in *Burke* v. *Kleiman*, *supra*, and in other cases in the Circuit and

Superior Courts of Cook County. The Chancellor reserved his ruling on the plea of *res judicata* and the cause proceeded to a hearing on the merits. At the close of the evidence the court found that the owners of only about fifty-four per cent of the frontage had signed the agreement, but held the question of execution was *res judicata.* A decree was entered in conformity with the prayer of the complaint, restraining defendant Burke from selling or leasing any real estate within the restricted area to Negroes, or to white persons for the purpose of selling or leasing to Negroes; restraining defendant Katz from selling or leasing a certain described building to Negroes; restraining defendants Pace and the Supreme Liberty Life Insurance Company from making any further loans on real estate in the restricted area to Negroes or for occupancy by Negroes; declaring the conveyance to Hansberry and wife void and ordering them to remove from the premises, and holding the restrictive agreement valid and in full force and effect. Inasmuch as a freehold is involved, defendants have appealed directly to this court.

In order to decide whether the question of due execution is *res judicata,* it will be necessary to examine the case of *Burke* v. *Kleiman, supra.* That was a suit to enforce this same agreement. Olive Ida Burke, wife of James J. Burke, a defendant in the case at bar, was plaintiff. The complaint recited that she filed it "on behalf of herself and on behalf of all other property owners in the district covered and affected by the agreement hereinafter mentioned, and who are, or whose grantors, direct or otherwise, were parties to said indenture of agreement, and whose property interests will be adversely and injuriously affected by the violation hereinafter mentioned by the said defendants of the covenants and terms of said agreement." The defendants were Isaac Kleiman, the white owner, Sam Kleiman, James

L. Hall, a Negro tenant, and Charles J. Sopkin, trustee of a trust deed on the property. The complaint alleged the agreement was signed by the owners of ninety-five per cent of the frontage and duly recorded February 1, 1928. A stipulation was entered into to this effect. The court recited the stipulation in its decree and found that the facts stipulated were true. The court further found, "that said indenture was in full force and effect on February 1, 1928, and all conditions therein contained with respect to execution and recordation thereof, were fully complied with;" that "all terms of said indenture agreement are entirely valid and binding," and that it is a covenant running with the land. This decree was affirmed by the Appellate Court.

It thus appears that *Burke* v. *Kleiman, supra,* was a class or representative suit. It cannot be seriously contended that it was not properly a representative suit. There was a class of individuals who had common rights and who needed protection. They were so numerous it would have imposed an unreasonable hardship and burden on them to require all members to be made parties to the suit. Under such circumstances we have repeatedly held that a court of equity has jurisdiction of representative suits, and where the remedy is pursued by a plaintiff who has the right to represent the class to which he belongs, other members of the class are bound by the results in the case unless it is reversed or set aside on direct proceedings. *Goves* v. *Farmers State Bank,* 368 Ill. 35; *Leonard* v. *Bye,* 361 *id.* 185; *Greenberg* v. *City of Chicago,* 256 *id.* 213.

Appellants contend the doctrine is inapplicable here for the reason there was no class, since the evidence shows the requirement that the owners of ninety-five per cent of the frontage sign the agreement, was not met. This

rgument loses sight of the fact that in *Burke* v. *Kleiman, upra,* the court had jurisdiction to determine whether r not that condition precedent had been complied with. The mere fact that it later appears that the finding is ntrue does not render the decree any the less binding. The principle of *res judicata* covers wrong as well as ight decisions, for the fundamental reason that there nust be an end of litigation. A matter which has once een determined by a court of competent jurisdiction annot, in a later suit involving the same subject matter nd the same parties or members of the same class, be gain inquired into.

We see no merit in the contention that *Burke* v. *Klei-an, supra,* is not *res judicata* because the fact of due xecution was established by stipulation. There is no evi-ence of fraud or collusion in that case. Defendant Burke, who was beneficial owner of plaintiff's property, vers in his answer here that that suit was instituted at he instance of the Woodlawn Property Owners Associa-ion, whose purpose was the enforcement of the restric-ive agreement. That may be true, but there is no show-ng of fraud or collusion in procuring that stipulation r that there was not an actual controversy in the case. t that time Burke was an officer of the Woodlawn Prop-rty Owners Association. Afterwards he resigned his osition and withdrew from the association with ill feel-ngs, and stated several times that he would put Negroes n every block of that property. In carrying out his hreat, he falsely represented that prospective customers ere white. As far as the record shows, if any fraud as committed, it was by Burke after he left the asso-ation. It does not appear that he was not acting in ood faith in *Burke* v. *Kleiman, supra.*

In our opinion the questions of execution and validity

of the restrictive agreement are *res judicata.* The reasons assigned, in addition to these urged in *Burke* v. *Kleiman, supra,* for holding the agreement invalid cannot be considered. It is well settled that the doctrine of *res judicata* extends not only to matters actually determined in the former suit, but also embraces all grounds of recovery and defense involved and which might have been raised. By assigning new reasons for holding the agreement invalid, which existed at the time that decision was rendered, the parties cannot relitigate the question settled by the prior decree. *In re Northwestern University,* 206 Ill. 64; *Midlinsky* v. *Rubin,* 341 *id.* 378; *People* v. *Wade,* 351 *id.* 484; *Webb* v. *Gilbert,* 357 *id.* 340.

The evidence fully justifies the finding of the Chancellor that the charges of the complaint were established, and appellants do not argue to the contrary, except as to Israel Katz. There was testimony that he said he would sell his property to anybody, including Negroes. This is sufficient evidence to warrant enjoining him from doing that which he is bound by the restrictive agreement not to do.

Appellants contend it was error to restrain the Supreme Liberty Life Insurance Company from making loans in the restricted area to Negroes or for Negro occupancy, for the reason mortgagees were expressly exempted from the operation of the restrictive agreement. The provision relied on is "and provided, further, that the lien of no mortgage or trust deed in the nature of a mortgage shall be impaired or invalidated by reason of the breach of any of the provisions of this agreement, whether any such breach shall have occurred prior or subsequent to the recording of any such mortgage or trust deed." The next clause is "and provided, further that nothing contained in the foregoing provisions shall in any manner

impair the right of any person or persons interested, to enforce at all times and against all persons the restrictions in this agreement contained prohibiting the use or occupation of all or any part of said premises by a Negro or Negroes." That part of the agreement relied on merely provides that the loan or mortgage shall not be invalidated by reason of its being made in violation of the restrictive agreement. It does not give mortgagees a license to conspire to destroy the agreement, as the evidence shows this insurance company was doing. The decree simply restrains them from making such loans in the future; it does not attempt to hold any existing loans or mortgages invalid. The court did not err in this respect.

We cannot agree that the court erred in overruling appellants' motion to set aside the decree and for a new trial. This motion was supported by an affidavit of Fred L. Helman, which recited that Helman was executive secretary of the Woodlawn Property Owners Association from 1926 to 1933. The substance of the affidavit is that he had charge of the work of obtaining signatures to the restrictive agreement, and that at the time the case of *Burke* v. *Kleiman, supra,* was instituted, as a result of his own investigation, he knew that the owners of ninety-five per cent of the frontage involved had not signed the agreement, and that he conferred with various officials of the association in regard to the filing of that suit. The affidavit does not state that he communicated his information to anybody, or that Olive Ida Burke or any individual of the representative class for whose benefit the suit was brought, or any of the officers of the association, except Helman, knew of this fact. As far as the affidavit discloses Helman is the only person who knew of the defect. It does not allege the suit was

brought at the request of the association or that it was not instituted by Mrs. Burke of her own volition and in good faith, for the benefit of herself and the other members of the class. The motion was properly denied.

The decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

Mr. JUSTICE SHAW, dissenting:

The opinion of the majority depends on its holding that the case of *Burke* v. *Kleiman, supra,* is *res judicata* of the points involved and that those points are not subject to further judicial examination. It is said first, that this was a class or representative suit, and second, that in that case the court had jurisdiction to determine whether or not the necessary ninety-five per cent of the frontage had signed up. It is further insisted that the question of jurisdiction cannot be collaterally attacked but that the only remedy must have been by appeal from the judgment in that case.

The opinion of the trial judge is based entirely upon the grounds of *res judicata* and he very reluctantly felt himself bound by the prior decision. Reference to the abstract of record shows a definite finding of the fact that the agreement was never signed by the requisite number of property owners and, in the words of the trial judge: "in other words, there is an invalid agreement which is now sought to be enforced * * * and we know it was a fraud because the proof now shows that there wasn't ninety-five per cent * * * he committed a fraud when he brought this lawsuit," etc.

The undisputed fact is that by means of fraud and collusion between total strangers and agreement which is void on its face has been imposed upon some ten

million dollars worth of the property of five hundred other parties who were never in court, who never had notice of any lawsuit, who were never by name or as unknown owners made parties of any lawsuit, and who have never been accorded any process whatever, either due or otherwise. And it is said that this is binding upon them; that they constituted a class because one man fraudulently said they did and another man collusively, and with equal fraud, admitted the allegation, because this second man signed a stipulation saying they had signed an agreement which they had never signed. Certainly no man's rights can be safe under such a rule of law. If one man can allege that I signed an agreement and another total stranger admit that I signed it and fraudulently bind me by this sort of an agreement, it would be contrary to the Fourteenth amendment of the constitution of the United States. The trial judge found the entire case of *Burke* v. *Kleiman* tainted with fraud, procured by collusion, and intended only to validate an otherwise invalid agreement. He very reluctantly entered a decree in this case because of a mistaken idea that the former judgment was *res judicata.*

The opinion in this case states that the defendants were so numerous that it would have imposed an unreasonable hardship and burden to make them all parties to the suit. This is a definite overruling of *Whitney* v. *Mayo,* 15 Ill. 251. It is true there were five hundred defendants, but even the humblest of these five hundred had a right to his day in court, to be made a party to the suit and to be given an opportunity to defend it. Their names were on the public records of Cook County and not the slightest excuse appears for not making them parties to the suit. If one sought to bind all the property in the

City of Chicago by some restrictive covenant, he would assume the burden of making every property owner in that city a party to his suit, either by name or as unknown owner, if he was, in fact, unknown. He could not gain an advantage for himself through a fraudulent scheme simply by saying they were too numerous to mention.

The want of due process is so obvious as to require no argument and it must be admitted. It is said, however, that the court had jurisdiction to determine whether or not it had jurisdiction, and a mere restatement of this proposition refutes it. A court never has jurisdiction to determine that it has jurisdiction when it, in law, has not. The question of whether or not a court has jurisdiction of the parties and the subject matter remains forever open and forever subject to collateral attack. No court can expand its own jurisdiction simply by finding that it has jurisdiction unless that finding is based upon a question of fact which it has power to decide. In *Caswell* v. *Caswell,* 120 Ill. 377, and in many subsequent cases, this rule has been made clear. (*Beck* v. *Lash,* 303 Ill. 549.) The most recent reference to it in this court is to be found in *People* v. *Sterling,* 357 Ill. 354, where we pointed out the distinction between that kind of fraud which goes to the jurisdiction of the court, as distinguished from that other kind which intervenes to procure a decree after the court has obtained a valid jurisdiction. The rule is too clear for restatement. Fraud which impairs or prevents attachment of jurisdiction may always be raised collaterally, and it is only that kind which intervenes after jurisdiction has been obtained that cannot be attacked.

We have in the case before us both kinds of fraud: Fraud in the procurement of the decree by a false stipu-

lation, and a fraud going to the jurisdiction of the court in the very basic and essential allegation that there was a valid agreement that it was actually signed by the necessary ninety-five per cent of frontage owners, and fraud in the jurisdictional allegation that there was a class to be represented when, in fact, no such class ever existed.

It is my opinion that even if the attempted agreement had been signed by the owners of ninety-five per cent of the frontage involved, and if the case of *Burke* v. *Kleiman* had been brought in good faith instead of fraudulently, it still could not have been such a class or representative suit as would impair the title of other property owners. Without going into extensive citations of authority, it seems clear to me that a class suit cannot properly be entertained except in that very limited field of cases where the parties have not only a common and general interest among themselves but also an identical right to be protected in a single and undivided res. The entire theory of class representation is a dangerous exception to the general rule that each interested person must be made a party by name, notified of the proceedings and given his day in court. The rules guarding it must be so strict and carefully enforced as to be commensurate with the risks of injustice which are involved. Due process most certainly required notice and an opportunity to be heard, and no case has come to my attention where the court has failed to make absolutely certain, in advance, that the parties to represent a class must be selected with such care and have such personal interest in the litigation as to guarantee that the rights of all will be fully protected.

In the case before us, each property owner held and owned his property in severalty. He might or might not

wish the covenant enforced. He might or might not wish to contest its validity. He might or might not wish to sell, lease or mortgage his property without regard to it. On any of these questions, his next door neighbor or any other property owner in the district might disagree with him. There could be no certainty nor even any probability that they would all agree on a course of conduct to be followed at any particular time or under any particular circumstances. There was no common right nor any common fund, nor any common or undivided res to be dealt with, and certainly no one ever had any right or power to speak for any one but himself.

The agreement which formed the foundation for this fraudulent case of *Burke* v. *Kleiman* provided on its face that it should be void and of no force or effect unless signed by the owners of ninety-five per cent of the frontage involved within a certain time and placed of record within a certain date. To me, it seems obvious that until those signatures were obtained and the very terms of the agreement itself complied with, there could by no possibility be even the semblance of a class to be represented in a class suit, even if such a suit could be possible under the circumstances, and it seems to be equally beyond question that such a defect in signers could not, in a court of chancery, be obviated through a fraudulent allegation that they had, in fact, been obtained when they had not, and an equally fraudulent and collusive and false stipulation that the owners had signed.

Mr. Justice Murphy concurs in this dissenting opinion.

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